United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original 76-7596

To be argued by
JAMES P. GRIFFIN

B
P/S

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

FRANK PASQUA,

Plaintiff-Appellant,

v.

NEW YORK CITY RETIREMENT SYSTEM; NEW YORK CITY DEPARTMENT OF CORRECTION and BENJAMIN J. MALCOLM, as Commissioner of the New York City Department of Correction,

Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEES' BRIEF

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Preliminary Statement

In this civil rights action brought pursuant to 42 U.S.C. §1983, plaintiff appeals from an order of the District Court for the Southern District of New York (WYATT, J.), dated October 27, 1976, directing summary judgment in favor of the defendants and dismissing the complaint.

Question Presented

Plaintiff, formerly a correction officer with the New York City Department of Correction, commenced this action alleging a deprivation of his civil rights arising out of his dismissal by the defendants.

Plaintiff unsuccessfully challenged his dismissal in an administrative hearing, and that determination was reviewed by the State courts in a proceeding brought pursuant to Article 78 of the CPLR. The questions presented are:

1. Is plaintiff's claim barred by the prior state court decisions under the principles of res judicata?

2. Assuming, arguendo, that the principles of res judicata do not bar this action, has the plaintiff stated a meritorious cause of action under Section 1983 of the Civil Rights Act?

Facts

Frank Pasqua, plaintiff, prior to his dismissal by defendants, served as a correction captain in the New York City Department of Correction (A3-A4).*

Pursuant to subpoena, plaintiff, with the aid of his attorney, appeared before the Department of Investigation on February 7, 1973 to be questioned on matters relating to his official duties (A124). He was informed by the examiner that he "had all of the rights and privileges guaranteed by the laws of the State of New York and the Constitutions of this State and of the United States, including the right not to be compelled to incriminate [himself]..." (A132). He was further told that if he refused to testify or answer any questions relating to the

*Unless otherwise indicated, numbers in parentheses refer to the pages of the Appendix.

performance of his official duties, he would be subject to dismissal (A132). Mr. Pasqua was assured by the examiner that if he did testify and answer questions, "neither your answer or any information or evidence which is gained by reason of such testimony or answers can be used against you in any criminal proceeding" (A133). Nonetheless, plaintiff refused to answer any questions presented to him (A124-A147).

Later in the same month, February, 1973, plaintiff was served with four charges and specifications involving misconduct in his role as a correction captain (A17-A18). The specifications alleged that (A21, A23):

> "1. The said captain did agree to serve as an intermediary in a bribery scheme whereby a sum of money ($5,000.00) was to be obtained by the said captain from one Joseph Denti for the purpose of securing the conditional release of inmate Thomas "Toto" Marino from the New York City Correctional Institution for Men. Rules: 3.8; 5.9; 5.14; 5.33; 5.54; 5.124; 6.13.
>
> "2. The said captain did provide favored treatment to inmate Aniello Dellacroce, #772-3382, by arranging for an unauthorized visit by his minor daughter, Annette Dellacroce and a friend, Rosemary Connelly between September 5, 1972 and November 20, 1972 under pass #10643, the said captain knowingly filing false documents to facilitate the said visits. Rules 5.9; 5.14; 5.124.

"3. The said captain did provide favored treatment to inmate Aniello Dellacroce, #772-3382, between August and November, 1972 in return for a case of liquor the said captain received from one Joseph Denti. Rules: 5.8; 5.9; 5.14; 5.33; 5.54; 5.124; 6.13.

"4. Having been officially summoned to appear and give testimony before the Department of Investigation on February 7, 1973 concerning his official duties, the said captain did refuse to testify. Rule 5.123A."

Pursuant to New York statutory law, a full Departmental hearing was held on March 15, 1973, before the Hon. Charles J. Kemins (A24). Plaintiff was represented by counsel and given the opportunity to cross-examine witnesses and present evidence on his own behalf (A24-A79). After hearing testimony and reviewing the evidence presented, Mr. Pasqua was found guilty of three of the four specifications, that is, providing favored treatment to an inmate and refusing to testify (A15). As a result thereof, plaintiff was dismissed (A15).

In July, 1973, Mr. Pasqua commenced a special proceeding, pursuant to Article 78 of the CPLR, to review the above determination. The proceeding was transferred to the Appellate Division where plaintiff submitted a brief containing five points, to wit (A88-A123):

"Point I

Petitioner was unlawfully discharged for refusing to answer questions posed by the City Commissioner of Investigation in reliance upon his privilege against self-

incrimination because under State law, the Commissioner lacked power to confer immunity.

Point II

The New York statutory scheme for conferring immunity is void for vagueness and violates the Due Process Clauses of the Federal and State Constitution if it permits discharge of the Petitioner for refusing to answer questions asked by the City Commissioner of Investigation on grounds of self-incrimination.

Point III

Respondents' determination was, on the entire record, not supported by substantial evidence.

Point IV

The Penalty imposed against the Petitioner was excessively harsh and grossly disproportionate to the alleged offense as to constitute an abuse of respondent's discretion.

Point V

Evidence in support of specifications two and three was based upon unlawful eavesdropping."

Each of the above points was elaborated upon with extensive citations of authority. After due deliberation, the Appellate Division unanimously confirmed the administrative determination and dismissed the petition. 48 AD 2d 768 (1st Dept., 1975). Leave to appeal the New York Court of Appeals was denied. 37 NY 2d 706 (1975).

Thereupon, plaintiff commenced the instant action pursuant to 42 U.S.C. 1983 (A3). His complaint alleged jurisdiction under 28 U.S.C. 1343(3) and 1343(4) and set

forth six causes of action claiming that the defendants had (A3-A8):

> (1) denied him effective use of counsel by denying him an opportunity to face his accusers and cross-examine them,
>
> (2) violated his fifth amendment rights against self-incrimination,
>
> (3) sought to coerce and elicit testimony from the plaintiff under the guise of a non-existent employer-employee relationship,
>
> (4) engaged in an illegal search by eaves-dropping,
>
> (5) unlawfully imposed an excessive penalty, and
>
> (6) denied him his right to an effective appeal in that the determination was not supported by findings of fact and conclusions of law.

Pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, the defendants moved to dismiss the complaint arguing that the six causes of action failed "to set forth facts sufficient to establish a claim under the civil rights statutes, and that, in any event, the operative facts under the complaint are frivolous in the extreme" (A17). Annexed to this motion were the charges and specifications, the transcript of the departmental

hearing, plaintiff's state court petition, the transcript of the questioning at the Department of Investigation, and plaintiff's brief to the Appellate Division.

Opinion Below

District Judge Wyatt treated the defendant's motion to dismiss the complaint as a motion for summary judgment because "matters outside the pleading have been presented to and not excluded by the Court". The Court then granted the defendants' motion, stating (A148-A149):

> "It is clear that the motion must be granted as to the Retirement System and the Department of Correction. Neither is a "person" under 42 U.S.C. §1983. Monroe v. Pape, 365 U.S. 167, 187-192 (1961).
>
> This leaves the individual defendant Malcolm.
>
> Plaintiff (Frank) was employed by the City of New York in the Department of Correction. He was dismissed effective April 16, 1973, after a departmental hearing and findings of guilt of infraction of rules and of refusal to testify before the Department of Investigation.
>
> The action is entirely without merit because Frank, having been found guilty after hearing of a refusal to testify, was required to be terminated as an employee of the City of New York. New York City Charter §1123. Such termination on April 16, 1973, violated none of his constitutional rights. Gardner v. Broderick, 392 U.S. 273, 275 fn. 3, 278 (1968).
>
> Frank's attempt to avoid the consequences of dismissal by retiring voluntarily was to no avail, since his retirement, filed on March 19, 1973, could have been effective no earlier than April 19, 1973, three days

after his dismissal. See New York City Administrative Code §B3-36.3(e).

Moreover, Frank litigated his dismissal in an Article 78 proceeding in the state courts. On May 13, 1975, the Appellate Division, First Department, unanimously confirmed the dismissal of Frank and dismissed his petition (371 N.Y.S. 2d 369). Frank did not pursue the matter further in the state courts. The question of his dismissal is thus res judicata in a subsequent federal claim under 42 U.S.C. §1983. Tang v. Appellate Division, 487 F. 2d 138 (2d Cir. 1973), cert. denied 416 U.S. 906 (1974).

It is now claimed, in a memorandum of law submitted for plaintiff, that some of the claims made here were not made in the state court. To the extent that this may be true, if at all, any new claims are frivolous in fact and without merit in law.

The motion is granted and the Clerk directed to enter judgment in favor of defendants dismissing the action."

POINT I

NEW YORK STATE LAW REQUIRES THAT A PUBLIC EMPLOYEE, WHO REFUSES TO TESTIFY ON MATTERS RELATED TO HIS OFFICIAL DUTIES AFTER BEING OFFERED FULL USE IMMUNITY, BE DISCHARGED. THE FINDING OF GUILT ON THAT SPECIFICATION ALONE WAS SUFFICIENT TO JUSTIFY THE PENALTY IMPOSED. THE ISSUE RELATING TO PLAINTIFF'S REFUSAL TO TESTIFY WAS CHALLENGED BY PETITIONER ON CONSTITUTIONAL GROUNDS IN AN ARTICLE 78 PROCEEDING AND REJECTED BY THE NEW YORK STATE COURTS. THE PRINCIPLES OF RES JUDICATA BAR THIS SUIT. ASSUMING, ARGUENDO, THAT THE PRINCIPLES OF RES JUDICATA DO NOT APPLY, THE COMPLAINT WAS PROPERLY DISMISSED SINCE IT DOES NOT STATE A MERITORIOUS CAUSE OF ACTION UNDER SECTION 1983 OF THE CIVIL RIGHTS ACT.

(1)

Preliminarily, we note that, under the rule laid down in Monroe v. Pape, 365 U.S. 167, 187-192 (1961), this civil rights action does not lie against the defendant New York City Retirement System or defendant New York City Department of Correction. The remainder of this brief is directed to the issue of liability of the remaining defendant, Benjamin J. Malcolm.

(2)

Plaintiff, having been found guilty of a refusal to testify on matters relating to his official duties, was required by statute to be terminated as an employee of the City of New York. The New York City Charter, Section 1123,

specifically states:

> "If any ... employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before ... any officer ... authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding ... official conduct of any officer or employee of the city ... on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry,...[his] employment shall terminate..."

In Lefkowitz v. Turley, 414 U.S. 90 (1973), the Supreme Court approved this principle but required that the employees' responses not be used against them in a subsequent criminal proceeding. See also Garrity v. New Jersey, 385 U.S. 493 (1967), Gardner v. Broderick, 392 U.S. 273 (1968); Sanitation Men v. Sanitation Commissioner, 392 U.S. 280 (1968); and Kastigar v. United States, 406 U.S. 441 (1972). In the case at bar, Mr. Pasqua was afforded full use immunity at the inquiry before the Department of Investigation but still refused to testify (A133). See Uniform Sanitation Men Ass'n v. Comm'r of Sanitation, 426 F. 2d 619 (2d Cir., 1970), cert. den. 406 U.S. 961 (1972).

Plaintiff specifically challenged the finding of guilt on his refusal to testify in his Article 78 proceeding in the State courts. His argument was found to be without merit by the Appellate Division. 48 AD 2d 768 (1st Dept., 197). Leave to appeal to the New York Court of Appeals was denied. 37 NY 2d 706 (1975).

A review of plaintiff's brief submitted to the Appellate Division cannot fail to convince that all the constitutional questions raised in the instant action were presented to that state court. Since, as discussed above, dismissal was required by statute upon a finding that plaintiff had refused to testify, the remainder of this brief will be directed to Mr. Pasqua's challenge to the finding of guilt on that specification alone. The principle of res judicata bars his suit in this respect.*

*In view of the fact that dismissal was proper on a finding of guilt on specification 4 alone, any alleged error committed as to the other two specifications of which plaintiff was found guilty would have been harmless. Aside from this, however in addition to his challenge to the immunity statutes and the authority of the Commissioner of Investigation to confer such immunity, plaintiff also argued in the State courts that the determination was not supported by substantial evidence, that the penalty imposed was excessive, and that the evidence in support of specifications two and three was based upon unlawful eavesdropping. These arguments were rejected by the state courts and the principles of res judicata apply to them also with equal force.

In Point I of his brief to the Appellate Division, plaintiff specifically challenged the authority of the Commissioner of Investigation to confer immunity; in Point II he challenged the entire New York statutory scheme for conferring immunity claiming that it was both void for vagueness and violative of the due process clauses of the Federal and State Constitutions. Plaintiff extensively elaborated upon these contentions offering abundant citations of authority but, nonetheless, his arguments were found lacking in merit. Clearly, the constitutional assault was broadly based and broadly considered by the state tribunal.

The Full Faith and Credit Clause of the United States Constitution requires that state court judgments be given the same res judicata effect in federal courts, as in state courts, even where federal constitutional questions are involved. American Surety Co. v. Baldwin, 287 U.S. 156 (1932); Gart v. Cole, 263 F. 2d 244 (2nd Cir., 1958), cert. den. 359 U.S. 978 (1959). The plaintiff does not avoid the application of the principles of res judicata and collateral estoppel merely because he sues under the federal Civil Rights Act. Lackawanna Police Benevolent Association v. Balen, 446 F. 2d 52 (2nd Cir., 1971); PI Enterprises v. Cataldo, 457 F. 2d 1012 (1st Cir., 1972); Taylor v. New York City Transit Auth., 433 F. 2d 665 (2nd Cir., 1970). In the Lackawanna case the plaintiff in the state courts had unsuccessfully challenged the constitutionality

of a New York statutory provision governing the number of hours worked by police officers. This Court, in a per curiam decision, held that the plaintiff's federal suit, brought under the Civil Rights Act, should have been dismissed on the ground that the state court judgment was res judicata. The Court stated:

> "Having lost in the state courts, plaintiff's remedy was to seek review by the Supreme Court. The Civil Rights Act, unlike federal habeas corpus, does not permit a second bite at the cherry. Howe v. Brouse, 422 F. 2d 347 (8 Cir. 1970); Scott v. California, 426 F. 2d 300 (9 Cir. 1970)."

Accord, Thistlethwaite v. City of New York, 497 F. 2d 339 (2nd Cir., 1974).

Neither Lombard v. Board of Education, 502 F. 2d 631 (2nd Cir., 1974), cert. den. 420 U.S. 976 (1975), nor Newman v. Board of Education, 508 F. 2d 277 (2nd Cir., 1975), cert. den. 420 U.S. 1004 (1975), has changed this rule. Indeed, Judge Gurfein in Lombard specifically reiterated this principle (502 F. 2d at pp. 636-637):

> "Of course, where a constitutional issue is actually raised in the state court, as it can be in an Article 78 proceeding by treating it as an action for a declaratory judgment, Matter of Kovarsky v. Housing and Development Administration, 31 NY 2d 184, 335 NYS 2d 383, 286 N.E. 2d 882 (1972), the litigant has made his choice and may not have two bites at the cherry. See Thistlethwaite v. City of New York, 497 F. 2d 339 (2d Cir., 1974)."

The Court in Lombard, supra, did state the principles of res judicata would not be applied to bar a procedural due process claim brought pursuant to the Civil Rights Act where such claim had not been actually litigated in the state court proceedings. The issues here presented were fully litigated in the state tribunal.

In Newman, supra, this Court held that for a preclusion to be effective "elaborations or citations of authority" must be presented in the state court proceeding and not just a mere mention of the constitutional question. Clearly, that requirement is satisfied in the instant case. Plaintiff's argument on this point in the state court was exhaustive with abundant citations of authority. Having raised these specific constitutional objections in the state tribunal, plaintiff may not be here given a second bite at the cherry. Lackawanna Police Benevolent Association v. Balen, supra 446 F. 2d 52; Thistlethwaite v. City of New York, supra 497 F. 2d 339; Taylor v. New York City Transit Authority, 433 F. 2d 665 (2d Cir., 1970); Brown v. DeLayo, 498 F. 2d 1173 (10th Cir., 1974).

(4)

Assuming, arguendo, that the principles of res judicata do not bar this action, the complaint was properly dismissed since it does not state a meritorious cause of action under Section 1983 of the Civil Rights Act.

It is undisputed that plaintiff refused to testify on matters related to his official duties before the Department of Investigation. It is also undisputed that the Department of Investigation offered full use immunity to the plaintiff. The Department of Investigation clearly has authority to grant such immunity. Uniformed Sanitation Men Assoc. v. Comm'r of Sanitation of New York, 426 F. 2d 619 (2d Cir., 1970), cert. den. 406 U.S., 961 (1972). Use immunity is the full extent of the protection which is constitutionally required in the instant case. Kastigar v. United States, supra, 406 U.S. 441; Uniform Sanitation Men Assn. v. Comm'r of Sanitation of New York, supra.

Plaintiff argues that at the time he was questioned at the Department of Investigation "no legitimate employer-employee relationship existed since the petitioner [sic] had been suspended without pay since January 23, 1973... A suspension is a temporary deprivation of one's office or position" (App. Br., p. 20). Plaintiff cites as authority the Oxford English Dictionary. Clearly, such an argument is frivolous.

POINT II

PLAINTIFF WAS NOT UNDULY PREJUDICED BY THE CONVERSION OF DEFENDANTS' MOTION TO DISMISS INTO A MOTION FOR SUMMARY JUDGMENT.

Plaintiff argues that the District Court "improperly converted defendants' motion to dismiss into a motion for summary judgment" (App. Br., p. 6). Annexed to defendants' motion were the following exhibits: the charges and specifications, the transcript of the departmental trial, plaintiff's state court petition pursuant to Article 78 CPLR, plaintiff's Appellate Division brief, and the transcript of the Department of Investigation hearing. It is well established that where the District Court considers matters outside the pleadings, the motion to dismiss should be treated as one for summary judgment. Gordon v. New York State Exchange, Inc., 498 F. 2d 1303 (2d Cir., 1974), affd. 422 U.S. 659 (1975); FRCP Rule 12(b).

The basis of plaintiff's contention is that he was not "given reasonable opportunity to present all material made pertinent to such a motion by Rule 56" FRCP Rule 12(b). He argues that as a result he was prejudiced in that he was precluded "from demonstrating the existence of issues of fact with regard to the electronic eavesdropping, the questioning of the plaintiff at the Department of Investigation, and the introduction of evidence at the departmental

trial derived from both of the above sources" (Ap. Br., p. 10). This contention is without merit.

Contrary to this unsupported contention, none of the evidence introduced at the departmental hearing could have been derived from his testimony before the Department of Investigation since the plaintiff in that appearance refused to answer any questions presented to him.

Paragraph 10 of the defendants' affidavit in support of their motion to dismiss makes it clear that the principles of res judicata formed the basis of that motion. Since, as discussed above, a public employee who is found to have refused to testify must be dismissed, here, too, we need only address this issue as it relates to the finding of guilt on that specification.

Rule 12(b) requires that plaintiff be given an opportunity to present "all material made pertinent" to a motion for summary judgment. There has been no showing that all such material on the issue of the refusal to testify was not before the Court. Therefore, the conversion of defendant's motion into a motion for summary judgment in no way unduly prejudiced plaintiff.

CONCLUSION

The order should be affirmed, with costs.

February 28, 1977

Respectfully submitted,

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Corporation Counsel,
Attorney for Appellees.

LEONARD KOERNER,
JAMES P. GRIFFIN,
of Counsel.

STATE OF NEW YORK :
SS.:
COUNTY OF NEW YORK :

BRIAN Sugden

being duly sworn, says that on the 28th day of FEBRUARY 197

at No. 299 Broadway in the Borough of MANH'H in NEW YORK CITY, he served a copy of the annexed APPELLEE'S BRIEF upon JOSEPH W. ALLEN Esq. the Attorney for the OPPOSING ATTORNEY in the within entitled action, by delivering a copy of the same to a person in charge of said Attorney's office, and leaving the same with him.

Sworn to before me, this 28th :
day of FEBRUARY 1977

Brian Sugden

JAMES BURNS
Commissioner of Deeds
City of New York - No. 4-1737
Commission Expires May 1, 1978

James Burns